CNN America, Inc. and Team Video Services, LLC, Joint Employers *and* National Association of Broadcast Employees & Technicians, Communications Workers of America, Local 31, AFL–CIO *and* National Association of Broadcast Employees & Technicians, Communications Workers of America, Local 11, AFL–CIO. Cases 5–CA–31828 and 5–CA–33125 (Formerly 2–CA–36129)

March 20, 2008

DECISION AND ORDER REMANDING PROCEEDING[1]

BY MEMBERS LIEBMAN AND SCHAUMBER

A hearing in the above proceeding opened before Administrative Law Judge Arthur Amchan of the National Labor Relations Board on November 7, 2007.[2] On December 5–6, 2007, witness Cynthia Patrick, executive vice president of news division operations for CNN America, Inc. (CNN or the Respondent), was called by the General Counsel as an adverse witness. In response to the General Counsel's questioning, Patrick testified that she had reviewed thousands of documents with the Respondent's attorneys several weeks before the hearing, for the purpose of identifying for counsel which documents contained confidential business-related information, in connection with CNN's voluntary production of documents to the General Counsel. CNN's counsel stated for the record that all of the documents that Patrick described were previously provided to the General Counsel.

The General Counsel requested that the judge require the Respondent to produce any documents reviewed by Patrick, pursuant to Federal Rule of Evidence 612. Rule 612 provides, in relevant part:

> [I]f a witness uses a writing to refresh memory for the purpose of testifying, either—
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

Rule 612's advisory committee notes, in relevant part, further explain:

> The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness. . . . The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial. . . . The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory. House Report No. 93-650.

During the course of several on-the-record discussions with the parties' counsel between December 5 and 11, 2007, the judge ruled that any documents reviewed by any witness within 6 months prior to the hearing must be turned over to opposing counsel before the witness' testimony. The judge reasoned that because the events in this case took place several years ago, he could not intelligently determine whether the witness is relying on the documents, and the witness might not even know what documents refreshed his or her recollection and what documents did not. Therefore, the judge stated that he would make the assumption with all witnesses that if the witness had looked at documents during the last 6 months (since the issuance of the complaint in April 2007), the documents may have refreshed the witness' recollection and they should be produced. In this regard, the judge stated that once the complaint was issued, subsequent review of documents falls into the category of preparation for testimony because the parties know that the hearing is coming. The judge also observed that Patrick's testimony "indicates she remembers very little

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The hearing in this case is currently in progress and is expected to continue for the next several months.

about the events in 2003 without some review of documentation." Citing Rule 612's "discretion" language, the judge effectively concluded that he could dispense with the "to refresh memory for the purpose of testifying" language of Rule 612 and order disclosure of documents. He stated, "I'm looking at the language of 612. It seems to me I have discretion as to whether to have them [the documents] turned over. I guess I will exercise my discretion to have them turned over."

The Respondent objected to the judge's ruling, arguing that the General Counsel failed to lay a proper foundation as required by Rule 612, and offered to introduce legal authority in support of its position. The judge overruled the Respondent's objections and ordered the Respondent to produce the requested documents, and the Respondent complied.

On December 18, 2007, the Respondent filed a supplemental[3] request for special permission to appeal from the judge's ruling regarding production of documents and a memorandum in support thereof, contending that the judge improperly applied Rule 612. The Respondent argues that, in order to require production of a document, Rule 612 requires a witness to have relied upon the document to refresh recollection, and the document must have had an impact on the witness' testimony. The Respondent also argues that by failing to require the General Counsel to make such a showing and instead adopting a blanket presumption that any documents reviewed in the past 6 months necessarily refreshed witnesses' recollection, the judge's ruling created the result that the advisory committee stated Rule 612 is intended to avoid—a wholesale exploration of an opposing party's files. The General Counsel and Charging Party NABET[4] Local 31 filed opposition briefs, arguing that the judge appropriately exercised his discretion in applying Rule 612, and the Respondent filed a reply.

Having duly considered the matter, we have decided to grant the Respondent's appeal and, on the merits, reverse the judge's ruling regarding the production of documents under Federal Rule of Evidence 612.

We find that the judge's ruling is inconsistent with both the letter and the spirit of Rule 612.[5] For Rule 612 to apply, the document(s) at issue must have been reviewed for the purpose of refreshing a witness' recollection. "[E]ven where a witness reviewed a writing before or while testifying, if the witness did not rely on the writing to refresh memory, Rule 612 confers no rights on the adverse party."[6]

Further, the judge appears to have misinterpreted Rule 612(2)'s reference to "discretion." The Rule's unambiguous language and the case law interpreting it demonstrate that the phrase "in its discretion" refers to a court's discretion *not* to order disclosure of documents *even if* they were used to refresh recollection before testimony.[7] There is no support for the broader interpretation that this phrase provides discretion to dispense with the "to refresh memory for the purpose of testifying" language of Rule 612 and order disclosure of documents without first requiring the requesting party to establish these foundational requirements through testimony. Therefore, the judge's ruling that witnesses' recollection was necessarily refreshed by any review of documents within the preceding 6 months, without first requiring the requesting party to establish that particular documents refreshed a witness' memory, was inconsistent with the requirements of Rule 612.

In addition to Rule 612's requirement regarding refreshing a witness' memory, the Rule requires that such refreshing was undertaken "for the purpose of testifying." As the advisory committee notes explain, the writing(s) must have had an impact on the witness' testimony. In other words, merely looking at or reviewing a document during the course of preparation for trial does not automatically trigger Rule 612.[8] The advisory committee stated that, by limiting disclosable documents to those that have an impact on the witness' testimony, the committee intended to safeguard against "fishing expeditions" and "wholesale exploration" of the many files and papers that a witness may have used in preparation for trial. We agree with the Respondent that the judge's ruling results in these exact scenarios against which the advisory committee expressly cautioned.

[3] The Respondent has also filed a request for special permission to appeal the judge's ruling concerning a subpoena issued by the Board. This special appeal will be addressed in a separate order.

[4] National Association of Broadcast Employees & Technicians, Communications Workers of America, Local 31, AFL–CIO.

[5] Sec. 10(b) of the Act and Sec. 102.39 of the Board's Rules and Regulations state that a Board hearing "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States."

[6] *U.S. v. Sheffield*, 55 F.3d 341, 343 (8th Cir. 1995) (citing Wright & Gold, *Federal Practice and Procedure* § 6185, p. 465 (1993)).

[7] See, e.g., *Wycoff Steel*, 303 NLRB 517, 526 (1991) (interests of justice did not require production of notes used by witness to refresh recollection prior to testimony); *Cosden Oil v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064, 1077 (5th Cir. 1984) (district court did not err in exercising its discretion to determine that interests of justice did not require production of documents used before testimony to refresh recollection); *Smith & Wesson v. U.S.*, 782 F.2d 1074, 1083 (1st Cir. 1986) (same).

[8] *Medtronic Xomed, Inc. v. Gyrus ENT LLC*, 2006 WL 786425, *6 (M.D. Fla. 2006) (citing *Suss v. MSX International Engineering Services, Inc.*, 212 F.R.D. 159, 165 (S.D.N.Y. 2002)); *In re Comair Disaster Litig.*, 100 F.R.D. 350, 353 (D. Ky. 1983).

When viewed in the light of the advisory committee notes to Rule 612 and case law interpreting the Rule, we find that the judge has (1) given an overly broad application to Rule 612; (2) ignored the Rule's prerequisites that require a witness' review of documents to have been used to refresh memory for the purpose of testifying, as well as the Rule's direction that discretion should be exercised to determine that production of the writing(s) is necessary in the interests of justice; and (3) erred by compelling production of documents in the absence of evidence that they were used to refresh a witness's memory for the purpose of testifying. Accordingly,

IT IS ORDERED that the Respondent's request for special permission to appeal the judge's ruling is granted, the administrative law judge's ruling is vacated, and the above proceeding is remanded to Administrative Law Judge Arthur Amchan for further action consistent with this Order.[9]

Dated, Washington, D.C. March 20, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] Accordingly, before ordering disclosure of documents pursuant to Rule 612, the judge shall receive evidence and perform an analysis under Rule 612 regarding whether particular documents were actually used to refresh a witness' recollection, and whether such refreshing was "for the purpose of testifying." Such evidence would include the identification of documents that a party claims were used to refresh recollection before testifying, and the eliciting of testimony to prove such an assertion, as well as evidence regarding the purpose for which the documents were reviewed. As the Respondent has not requested a specific remedy with respect to documents that have already been disclosed pursuant to the judge's ruling, we apply this order prospectively only, without prejudice to raising this issue in any exceptions to the judge's decision that he will issue following the conclusion of the hearing.

Further, although the Respondent makes several references to privileged documents in its memoranda, we find it unnecessary to conduct an analysis of attorney-client privilege or attorney work product at this time, in the absence of the identification of any particular documents alleged to be protected from disclosure. Likewise, we find it unnecessary to address the Respondent's discussion in its memoranda of the judge's in camera review of certain documents in the General Counsel's possession, in the absence of any request for special permission to appeal the judge's rulings that several of these documents were protected from disclosure by the attorney-client privilege and/or attorney work product doctrine.